

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SAFFORD SERVICES CORP.</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 831241</b>
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2018 through May 31, 2021.	:	

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Petitioner, Safford Services Corp., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2018 through May 31, 2021.

On April 28, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing by its owner/president, Justin Safford, submitted a response by August 17, 2023, which date began the 90-day period for issuance of this determination.

After reviewing the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Safford Service Corp., a notice of determination, bearing assessment number L-056438812, dated July 1, 2022, for the period June 1, 2018 through May 31, 2021 (notice). The notice was issued to petitioner at an address in Ripley, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0595 7428.

2. On October 24, 2022, petitioner filed a petition with the Division of Tax Appeals in protest of the notice. The envelope, containing the petition, bears the United States Postal Service (USPS) Priority Mail Express 1-Day postmark of October 24, 2022. Petitioner's address listed on the petition is the same Ripley, New York, address listed on the notice.

3. On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the notice was issued on July 1, 2022, but the petition was not filed until October 24, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents: (i) an affirmation, dated July 28, 2023, of Kaitlyn Smith, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated July 11, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail – Assessments Receivable" (CMR) postmarked July 1, 2022; (iv) an affidavit, dated July 11, 2023, of Susan Ramundo, a manager in the Division's mail room; (v) a copy of the notice of

determination, dated July 1, 2022, together with the associated mailing cover sheet; and (vi) a copy of petitioner's electronically filed form IFTA – 100, IFTA Quarterly Fuel Use Tax Return for the period July 1, 2021 through September 30, 2021 (IFTA quarterly fuel use return), filed on June 27, 2022. The address listed on the IFTA quarterly fuel use return is the same address as listed on both the petition and the notice and was the last known address for petitioner at the time the notice was issued.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier has been Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. She was a Supervisor of Administrative Analysis from July 2019 through August 2022. Ms. Denier began working for the Division in February 1986 and has been a supervisor in MAPS since October 2004. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20221751700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "07/01/22." In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page

numbers of the CMR run consecutively, starting with “Page: 1,” and are noted in the upper right corner of each page.

6. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “CERTIFIED NO.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “REFERENCE NO.” The names and addresses of the recipients are listed under “NAME OF ADDRESSEE, STREET, and PO ADDRESS.”

7. The CMR in the present matter consists of 19 pages and lists 198 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 19, which contains zero entries. Ms. Denier notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark, dated July 1, 2022, to each page of the CMR, wrote “198” on page 19 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and signed or initialed the last page of the CMR.

8. Page 17 of the CMR indicates that a notice with certified control number 7104 1002 9730 0595 7428, and reference number L-056438812 was mailed to “SAFFORD SERVICE CORP” at the Ripley, New York, address listed on the notice. The corresponding mailing cover

sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division’s mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail room staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage, and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark dated July 1, 2022. In addition, she attests that the USPS employee’s initials, or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s

initials or signature indicates that all 198 articles of mail listed on the CMR, including the article addressed to petitioner, was received by the USPS for mailing on July 1, 2022.

10. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on July 1, 2022, as claimed.

11. In response to the notice of intent to dismiss petition, petitioner's owner/president, Mr. Safford, submitted a letter, along with documentation pertinent to the underlying merits of this matter. In his letter, Mr. Safford claims, among other things, that the notice of determination was not received or seen by him.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law § 1138 [a] [1]).

Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

A motion for summary determination may be granted:

“if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

C. Where, as here, the timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to petitioner’s last known address (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and its representative, if any) at its last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely petition was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

E. In this case, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on July 1, 2022. The CMR has been properly completed and, therefore, constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2022). Further, the address on the mailing cover sheet and the CMR conform with the address listed on petitioner's electronically filed IFTA quarterly fuel use return, which satisfies the "last known address" requirement. It is therefore concluded that the Division properly mailed the notice on July 1, 2022, and the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

F. Since the Division has demonstrated proper mailing of the notice, such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (*see* Tax Law § 1147 [a] [1]). In this case, petitioner did not contest that the Division properly mailed the notice to its address, but rather, petitioner claims that the notice was not received or seen by its owner/president. Mere denial of receipt of the notice without more is not sufficient to overcome the statutory presumption of receipt (*see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]; *Matter of Rosenbaum*, Tax Appeals Tribunal, November 5, 2018).

G. Here, the petition was not filed until October 24, 2022, a date that falls beyond 90 days after the July 1, 2022, date of issuance of the notice. Accordingly, the petition was

untimely filed, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*).

H. The petition of Safford Service Corp. is dismissed.

DATED: Albany, New York  
November 9, 2023

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE